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IN THE

Supreme Court of the United States

October Term, 1965
No. 528

A. J. BUMB, Trustee in Bankruptcy,

Petitioner,

vs.

B. L. SUHL, MARGARET WIERMAN, CURRENCY EXCHANGE and AMERICAN SECURITY CURRENCY, LTD.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 28, 1965.

Citation to Opinions Below.

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* p. 2, is reported in .... F. 2d ..... The Referee in Bankruptcy did not write an opinion, nor did the District Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 28, 1965. Rehearing was denied on July 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented.

1. Whether the Trustee in Bankruptcy may proceed in summary proceedings to recover back specific sums of money taken by respondents without substantial adverse claim thereto, immediately prior to bankruptcy, and now in respondents' actual possession.

2. Whether the Trustee in Bankruptcy pay proceed in summary proceedings to obtain a determination of *alter ego*, where no substantial adverse defense is asserted.

Statute Involved.

The statutory provision involved is Section 2a(7) of the Bankruptcy Act, 11 U.S.C. Sec. 11a(7). It is printed in Appendix A, *infra*, p. 1.

Statement.

An original proceeding under Section 322 of Chapter XI of the Bankruptcy Act, 11 U.S.C. Section 722, was filed by Security Currency Services, Ltd., a California corporation, engaged in the money order business. The jurisdiction of the Bankruptcy Court was invoked because the case arises under the Bankruptcy Act. No plan of arrangement was confirmed and the Debtor was adjudicated a bankrupt and petitioner appointed as Trustee in Bankruptcy.

The controlling principals of the bankrupt corporation were respondents B. L. Suhl and Margaret Wierman. Respondent American Security Currency, Ltd. was an affiliated corporation wholly owned and controlled by Suhl and Wierman. Suhl also carried on business under the fictitious firm name of respondent Currency Exchange.

Petitioner instituted summary proceedings for an accounting and return of monies taken from the bankrupt on the eve of bankruptcy by the controlling principals of the bankrupt, respondents B. L. Suhl, and Margaret Wierman, and one of their wholly owned corporations, American Security Currency, Ltd. As a separate cause of action, petitioner sought a determination that the bankrupt corporation is merely a shell and a dummy and the *alter ego* of Suhl and Wierman, and for authority to marshal their assets and administer the same to satisfy the obligations of the bankruptcy estate.

The respondents, without denying the allegations of petitioner's application, and without setting up any adverse claims to the monies alleged to have been taken, filed a special appearance and motion to dismiss for lack of summary jurisdiction of the Bankruptcy Court. Over this objection to summary jurisdiction, the bankruptcy court conducted proceedings to determine whether or not (1) monies of the bankrupt were taken by the respondents; (2) whether or not the respondents had any substantial adverse claims to these monies; and (3) whether or not the respondents had any substantial defense to the *alter ego* claim of the Trustee in Bankruptcy. After a trial, in which the respondents were afforded every opportunity to set up a defense, or an adverse claim, the Referee in Bankruptcy found (1) that Suhl, Wierman, Currency Exchange and American Security Currency, Ltd. had taken $455,343.28 of the bankrupt's money, without any right, or claim of right thereto (2) that the separate existence of the bankrupt corporation was a sham in that it was in fact a naked shell and the *alter ego* of Suhl, Wierman and Currency Exchange; and (3) that while respondents were in actual posses-

sion, they set up no substantial adverse claim to the money taken, nor any claim of inability to repay the same and that, therefore, the Trustee in Bankruptcy had constructive possession and the Bankruptcy Court had summary jurisdiction to enter an order for the return of the money. The Referee thereupon entered his order directing the marshalling of the assets of Suhl, Wierman and Currency Exchange under the *alter ego* cause of action to satisfy the claims against the bankruptcy estate, and separately, ordered the return of the $455,-343.28 as against respondents Suhl, Wierman, Currency Exchange and American Security Currency, Ltd.

The Referee's Findings of Fact, Conclusions of Law and Order were made and filed on May 27, 1964. Respondents took a review to the United States District Court, which entered its judgment affirming the Referee in Bankruptcy on September 16, 1964.

Respondents took an appeal to the Court of Appeals for the Ninth Circuit. The Circuit Court, in its judgment of June 28, 1965, reversed the District Court and the Referee in Bankruptcy, and held that the Bankruptcy Court was without summary jurisdiction in the matter.

In its opinion, the Circuit Court made the following important points:

1. "In the present suit, appellants were in actual possession of substantial assets which the trustee in bankruptcy claimed were part of the bankrupt's estate."

2. "The summary proceedings conducted by the Referee certainly may lead one to reasonably conclude that appellants have no substantial defense to the trustee's allegations of fraud."

The existence of the assets in the actual possession of the respondents was recognized, and the Referee's findings of lack of substantial adverse claim was not disturbed.

In this posture, with the Trustee in Bankruptcy having established the amount taken; with no adverse claim being set forth or shown by respondents; with naked, physical possession in the respondents, the Court of Appeals concluded that the doctrine of constructive possession could not apply where the property taken and withheld was money and that, therefore, the Bankruptcy Court was without summary jurisdiction to order its return.

The Court of Appeals further concluded that the petitioner's separate and distinct cause of action to establish *alter ego* and to direct marshalling of the assets was the only method to establish constructive possession, and that the bankruptcy court, despite the decision of this Court in *Sampsell v. Imperial Paper & Color Corporation* (1941), 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 could not determine *alter ego* in a summary proceeding, even in the absence of any adverse claim or defense.

The Referee in Bankruptcy and the District Court, in determining that the Bankruptcy Court had summary jurisdiction in this case to pass on the *alter ego* issue, relied on the opinion of this Court in *Sampsell v. Imperial Paper & Color Corporation* (1941), 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, and the opinion in *Teasdale v. Robinson* (C.A. 8th 1961), 290 F. 2d 108. The Court of Appeals distinguished Sampsell on the basis that, in this case the corporate shell was in

bankruptcy, with the assets being diverted by the individuals who were not in bankruptcy. It did not mention Teasdale.

The Referee in Bankruptcy and the United States District Court in determining that the Bankruptcy Court had summary jurisdiction to order the return of the money taken without adverse claim thereto, relied on the decision of this Court in *May v. Henderson* (1925), 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 (summary proceedings ordering return of money converted prior to bankruptcy), as well as the decisions in *Rabinovitz v. Oughton* (CCA 3, 1937), 92 F. 2d 297 (summary proceedings ordering return of money converted prior to bankruptcy); *American Mannex Corporation v. Huffstutler* (CA 5th, 1964), 329 F. 2d 449 (summary proceedings ordering return of property or its proceeds converted prior to bankruptcy); and *Teasdale v. Robinson* (CA 8th, 1961), 290 F. 2d 108 (money diverted from ever coming into possession of the bankrupt corporation ordered returned in summary proceedings, along with summary determination of *alter ego*). These authorities were not discussed by the Court of Appeals.

Reasons for Granting the Writ.

1. The Supreme Court has unique supervisory authority over bankruptcy proceedings, and there is no area of the bankruptcy law presently in such a state of flux and confusion as the judge-made law area of equating constructive possession with the lack of substantial adverse claim by a person in actual possession.

Every day, Trustees in Bankruptcy are asserting constructive possession to property, including money,

taken from bankrupt estates by insiders on the eve of bankruptcy without any possible claim of right thereto. Often the bankruptcy estates are completely stripped of funds and assets with which to prosecute lengthy and expensive plenary suits to recover back what is clearly, and without substantial dispute, the bankrupt's assets. Unless the availability of summary proceedings to recover back the bankrupt's property in such cases, is clarified and defined by this Court, the effects of the Court of Appeals' decision will be disastrous to bankruptcy administration in the Ninth Circuit, and in other areas that may choose to follow the restrictive ruling of the Court of Appeals.

It is of vital importance that the Supreme Court assert its position in this area involving the availability of summary proceedings in the absence of substantial adverse claims, so that the law may be clarified and followed by the Circuits uniformally.

2. There is a conflict between the present ruling of the Court of Appeals refusing to allow summary proceedings to determine the existence of *alter ego* in the absence of an adverse claim, and the opinion of this Court in the matter of *Sampsell v. Imperial Paper & Color Corporation, supra.* In the *Sampsell* case, the individual divested himself of his assets, transferred said assets to the *alter ego* corporation. In the present case, the individuals looted the corporation and then threw it into bankruptcy proceedings.

3. There is a conflict between the ruling of the Court of Appeals that the Bankruptcy Court does not have summary jurisdiction to order the return of money held by the respondents without adverse claim thereto in summary proceedings, and the decision of this Court

(overruling the Court of Appeals for the Ninth Circuit) in *May v. Henderson* (1925), 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870. As Justice Stone therein stated at page 118:

> "The findings of the Referee and the evidence leave no doubt that the surrender or abandonment of their bank account to the bank by the assignees and its attempted application by the bank for the payment of its note, was collusive and without any substantial basis of legal right. At most it was a clumsy, ineffectual and fraudulent effort to divert the funds of the bankrupt to the payment of a favored creditor. While it is now settled that the claim of an assignee for the benefit of creditors, of the right to charge in his account expenses incurred or expenditures made prior to the filing of the petition in bankruptcy, in an adverse claim which cannot be adjudicated in a summary proceeding (cases cited), we think the rule cannot be extended to a case such as this, where the claim is merely colorable, and on its face made in bad faith, without any legal justification."

The rule of *May v. Henderson,* being followed in many bankruptcy courts, is now jeopardized within the Ninth Circuit.

3. There is a conflict between the present ruling of the Court of Appeals for the Ninth Circuit and the decisions in three other Circuits. In *Rabinovitz v. Oughton* (CCA 3, 1937), 92 F. 2d 297, the appellant withdrew monies from the bankrupt prior to bankruptcy, which were allowed to be recovered in summary proceedings. In *American Mannex Corporation v. Huff-*

stutler (CA 5th, 1964), 329 F. 2d 449, steel, belonging to the bankrupt, was converted prior to bankruptcy and partially disposed of. Summary proceedings were held to be proper to recover back the steel taken, or its proceeds. In *Teasdale v. Robinson* (CA 8th, 1961), 290 F. 2d 108, monies were diverted from the bankrupt corporation by certain insiders prior to bankruptcy. The money never actually reached the bankrupt corporation and the respondents therein objected to summary jurisdiction and asserted an adverse claim thereto. It was held that the monies could be recovered in summary proceedings and, as the Court stated in clear and unambiguous language at page 115:

> ". . . an ingenuous adverse claim which is a sham and a pretense is not an ingenuous substantial adverse claim which calls for plenary action in a court other than a court of bankruptcy."

Each of these cases, relied upon by the Referee in Bankruptcy and the United States District Court, were called to the attention of the Court of Appeals and were passed over in silence in the opinion of the Court of Appeals for the Ninth Circuit. The law, therefore, appears to be that a cow taken on the eve of bankruputcy by a third party without claim of right may be recovered back in summary proceedings. Money taken without claim of right can be recovered back in summary proceedings in the Third, Fifth and Eighth Circuits, but not in the Ninth Circuit.

4. The questions presented herein are of clear importance in the administration of the Federal Bankruptcy law, because they arise in case after case, and could involve the ability, or inability of a looted estate

to recover back its own property where funds to finance extensive plenary litigation are not available, and where no defense is asserted that would require plenary litigation. It does not appear to be sound public policy, nor is it required by the provisions of the Bankruptcy Act, and the cases interpreting the Act, to require the prosecution of claims such as these in plenary proceedings. This Court should review the case so that Federal and State Courts should not be burdened unnecessarily with suits that could properly and should properly be disposed of in summary proceedings by the Bankruptcy Court.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL,
IRVING SULMEYER,
Attorneys for Petitioner.

August 31, 1965.

APPENDIX A.

Section 2a(7) of the Bankruptcy Act, 11 U.S.C. Sec. 11a(7).

"2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereinafter held, to—

> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determined controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

B. L. Suhl, Margaret Wierman, Currency Exchange, and American Security Currency, Limited, Appellants, vs. A. J. Bumb, Receiver in the Matter of Security Currency Services Ltd., a California corporation bankrupt, Appellee. No. 19,737.

[June 28, 1965]

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Chambers, Barnes and Duniway, Circuit Judges; Barnes, Circuit Judge:

Bud Lewis Suhl, Margaret Wierman, and their two wholly-owned corporate entities—Currency Exchange and American Security Currency, Ltd.—have instituted this appeal from the decision of a referee in bankruptcy, affirmed by the district court, which found them indebted to the bankrupt, Security Currency Services, Ltd., in the sum of 455,343.23. Appellants challenge the jurisdiction of the referee to make such a determination in a summary, rather than plenary, proceeding.

The proceedings in question originated under Chapter XI of the Bankruptcy Act. Under Sections 24 and 25 of that Act, we have jurisdiction to entertain this appeal from the final order of the district court.

Pursuant to the provisions of the Bankruptcy Act, the referee in bankruptcy is vested with the power to determine the rights of adverse claimants to the assets

of the bankrupt's estate. In the course of administration of the estate, the adverse claims may be resolved without resort to plenary suits; the bankruptcy court rather may exercise summary jurisdiction to determine the proper distributions. This summary procedure is, of course, necessary to safeguard against cumbersome litigation for all conflicting claims to each asset of the estate. To invoke this summary procedure, however, the assets in question must be in the possession of the bankrupt. The possession requirement has not been applied in an unduly restrictive fashion; generally, if the controversy involves property in the actual or constructive possession of the bankruptcy court, the court may adjudicate summarily all rights and claims pertaining thereto. On the other hand, if the property is within the actual or constructive possession of a third party who asserts a bona fide claim to the property, the bankruptcy court cannot summarily determine the merits of that claim without the consent of the third party; rather, a plenary suit is required.

In the present suit, *appellants were in actual possession of substantial assets* which the trustee in bankruptcy claimed were a part of the bankrupt's estate. It was the trustee's contention, agreed in by the referee and district court, that these assets were in the *constructive possession* of the bankrupt corporation. It was also contended by the trustee, and accepted by the referee and district court, that the merits of appellants' adverse claims to these assets could be evaluated in the exercise of the bankruptcy court's summary jurisdiction because the adverse claims were colorable, not bona fide. Appellants argue that this exercise of summary jurisdiction exceeded the powers of the bankruptcy

court, and they attack the findings of the referee which justified this exercise of jurisdiction.

The extraordinary facts of this elaborate matter, to the extent they have been uncovered, are detailed in the referee's findings. An extract of these complex facts is contained in the "Certificate on Review from Referee's Order," and reads as follows:

> "Margaret Wierman is the mother of B. L. Suhl. At all times since at least 1959, B. L. Suhl and Margaret Wierman, under a partnership agreement, owned at least 85% and at times 100%, of the capital stock of the debtor corporation. The debtor corporation was engaged in the money order business within the state of California, under state regulation. Sometime in 1959, B. L. Suhl and Margaret Wierman formed American Security Currency, Ltd., to engage in the money order business outside the state of California, and capitalized it for $5,000.00. B. L. Suhl and Margaret Wierman at all times owned 100% of the capital stock of American Security Currency, Ltd. Because of the nature of its business and the amount of its capitalization, American Security Currency, Ltd. had banking problems, including difficulty or inability in maintaining its bank account in a collected position. From 1959 to June, 1961, Margaret Wierman acted as President of Security Currency Services, Ltd. In 1961 B. L. Suhl and Margaret Wierman, using funds of American Security Currency, Ltd., purchased controlling interest in the Frontier Bank, at Covello, California. Mrs. Wierman was installed as President of the Frontier Bank and a Wierman-Suhl nominee, Paul E. Lewis,

was made President of the debtor. At all times, however, B. L. Suhl and Margaret Wierman maintained domination over the debtor corporation. The Frontier Bank and the collective position of the debtor corporation were used by B. L. Suhl and Margaret Wierman to carry the uncollected position of American Security Currency. Finally, under instructions of Suhl and Wierman, the debtor corporation, without the consent of its board of directors, issued a written authorization for the Frontier Bank to charge its (Security Currency Services, Ltd.) trust account for any money orders of American Security Currency, Ltd. In January of 1964, the Frontier Bank purporting to act under said authorization, debited the money order trust account of the debtor corporation for money order shortages in the account of American Security Currency, Ltd., in the amount of $135,730.22 on January 13, 1964, $48,626.46 on January 14, 1964, and $30,990.46 on January 24, 1964. The agency account of the debtor corporation was also charged for shortages of American Security Currency, Ltd. in the sum of $8,283.61. Prior to this, in December of 1963, Suhl and Wierman had already caused to be withdrawn from the trust account of the debtor corporation, funds of the debtor corporation in the amount of $85,-787.00 and caused said funds to be paid over to American Security Currency, Ltd. without any consideration therefor. The books of American Security Currency, Ltd. were not produced, despite the issuance of a subpoena duces tecum therefor, which was served upon the president of American Security Currency, Ltd. to wit: B. L. Suhl, and

its purported secretary, Aaron Blackman. Testimony traced the whereabouts of the books to a messenger service for delivery to B. L. Suhl. B. L. Suhl invoked the provisions of the Fifth Amendment of the United States Constitution when asked as to the whereabouts of the records." (Tr. 45-47.)

On the basis of the above facts, the referee concluded that a unity of ownership and control existed between Suhl and Wierman on the one hand and the debtor corporation on the other. He found "that at all times since 1959, the debtor corporation had been a mere shell and naked framework that Suhl and Wierman used as a mere conduit for the conduct of their personal business property and affairs and that the corporation was used and continued by Suhl and Wierman pursuant to fraudulent plans, scheme and device conceived and operated by Suhl and Wierman, whereby the income, revenue and profits of the debtor corporation were diverted by Suhl and Wierman to Suhl and Wierman and to their wholly owned corporation, American Security Currency, Ltd." (Tr. 47-48.)

The referee concluded that appellants' claim to the assets sought by the trustee was frivolous. In the absence of a bona fide claim to this property, the referee concluded the property was in the constructive possession of the bankruptcy court and that the bankruptcy court could exercise its summary jurisdiction to determine the merits of the adverse claim. Concluding that appellants were the alter egos of the debtor corporation, the referee held that the trustee could administer the assets of the alter egos subject only to the right of Suhl and Wierman to the continued possession of their ex-

empt assets. The referee also summarily concluded that appellants were indebted to the bankrupt in the sum of $455,343.28, and that the trustee was entitled to a turnover order against each of appellants in that amount.

The power of a bankruptcy court to resolve adverse claims concerning the assets of the bankrupt's estate is indeed a power of imposing magnitude. Since it results in depriving adverse claimants of a plenary suit, we must ever be cautious lest we permit its extension to a situation that should not permit summary disposition. Where the property in question is in the actual custody of the bankrupt's estate, summary jurisdiction is clearly authorized. Where the physical property is in the constructive possession of the bankrupt, *e.g.*, where a salesman has a truck laden with the bankrupt's wares, we also have no difficulty in upholding the exercise of summary jurisdiction. When, however, the property in question is in the possession of third parties who purport to hold the property free of any claim of the bankrupt, we must carefully examine whether the expedited summary process is appropriate to the situation. This would seem particularly true in a situation, such as the present, where the property in question is a money claim against third parties rather than a physical asset alleged to be part of the bankrupt's estate. Judicial recognition of these relevant factors is typified by the statements of the circuit court and Supreme Court in *Magnolia Pet. Co. v. Thompson,* 106 F.2d 217 (8th Cir. 1939), *rev'd on other grounds* 309 U.S. 478 (1940):

> "It is now settled that the bankruptcy court has power in a summary proceeding to adjudicate, without consent, controversies concerning the title

to property the physical possession of which is in the actual or constructive possession of the trustee, and with consent of the adverse claimants, the title to property not in the possession of the trustee; but the court is without power to adjudicate adversary claims to the title to property, without consent, not in the actual or constructive possession of the trustee." 106 F.2d at 222.

In the Supreme Court it was said:

"Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy." 309 U.S. at 481.

In the present case, the referee, without resort to a plenary proceeding with its attendant safeguards, found that appellants had fraudulently extracted funds from the bankrupt, and, as a result, appellants would be compelled to turn over substantially all their assets for the administration of the bankrupt court. The referee, by virtue of summary proceeding, found that appellants were the *alter egos* of the bankrupt and that assets to which appellants had ostensible title and actual possession were consequently subject to the administration of the bankruptcy court.

The referee's justification for its summary determination was that appellants had no substantial defense to the trustee's claims and, therefore, appellants' assets were in the constructive possession of the trustee. Appellants reply that they rely on a lack of jurisdiction.

We find that no matter how heinous appellants' acts may have been, appellants are entitled to a plenary proceeding before a bankruptcy court can subject them to its unrestricted jurisdiction. No case cited by appellee extends summary jurisdiction to the lengths suggested here. The summary proceedings conducted by the referee certainly may lead one to reasonably conclude that appellants have no substantial defense to the trustee's allegations of fraud. But *without actual or constructive possession of the property in the hands of the trustee, summary jurisdiction is not authorized,* and adverse claimants must be afforded the right to a plenary independent suit. Unlike the bulk of the cases cited by appellee, this is not an instance of an adverse claimant making a colorable claim to a piece of property which results in a finding of constructive possession in the trustee. This is rather a finding that appellants are the alter egos of the bankrupt and thus subject to the complete control of the bankruptcy court. The distinction between the traditional notion of constructive possession and what is involved here can perhaps best be brought out by the statement of the court in *Matter of Retail Stores Delivery Corp.,* 5 F.Supp. 892, 893 (S.D.N.Y. 1933):

> "Barring cases where the party proceeded against consents, the jurisdiction of the bankruptcy court to take summary action regarding the bankrupt estate rests on possession, actual or constructive, of the property involved. [case] Cases of jurisdiction supported by actual possession are where the property is or was in the physical custody of an officer of the bankruptcy court. [cases] Then there were the cases of constructive possession,

> where the property at petition filed was in possession of the bankrupt, his agent, bailee or other person holding for him, or was in possession of one whose claim, though asserted as adverse, is found on inquiry to be no more than colorably so. [cases]"

The only manner by which the trustee can be deemed in constructive possession of appellants' asserts is by a determination of alter ego, *i.e.*, that the appellants and the bankrupt are pragmatically one and the same. The few instances of alter ego determinations in summary proceedings involve fact situations substantially different from the present. They rather invariably concern situations in which an insolvent individual has conveyed his property to a newly-formed corporation with the express view to withdrawing that property from the reach of creditors. These cases stand only for the proposition that a finding that adverse claimant is a legally distinct entity from the bankrupt does not in itself compel the use of a plenary suit. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941).

The *Sampsell* case, *supra,* involved the classic illustration of a bankrupt seeking to utilize a dummy corporation and being prevented from doing so by the judicial use of the alter ego doctrine. The Supreme Court refused to condone such a devious attempt to avoid the summary from the bankrupt's actual or constructive possession:

> "The referee found, *inter alia,* that the transfer of the property to the corporation was not in good faith but was made for the purpose of placing the property beyond the reach of Downey's

creditors and of retaining for Downey and his family all of the beneficial interest therein; that the stock was issued in satisfaction of Downey's claim against the corporation, when Downey was hopelessly insolvent, to prevent Downey's creditors from reaching the assets so transferred; that the corporation was 'nothing but a sham and a cloak' devised by Downey 'for the purpose of preserving and conserving his assets' for the benefit of himself and his family; and that the corporation was formed for the purpose of hindering, delaying and defrauding his creditors. The referee accordingly ordered that the property of the corporation was property of the bankrupt estate and that it be administered for the benefit of the creditors of the estate." 313 U.S. at 216, 217.

"Mere legal paraphernalia will not suffice to transform into a substantial adverse claimant a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket. Whatever the full reach of that rule may be, it is clear that a family corporation's adverse claim is merely colorable where, as in this case, the corporation is formed in order to continue the bankrupt's business, where the bankrupt remains in control, and where the effect of the transfer is to hinder, delay or defraud his creditors." *Id.* at 218.

The present case presents a situation not analogous to what transpired in *Sampsell.* We have here an order that ***all the assets*** of certain ***individuals*** and their wholly-owned corporate entities be administered as the

assets of the debtor corporation. This order would create a precedent for the administration by the bankruptcy court of all the assets of an individual or individuals upon the *summary* determination that that individual or individuals had perpetrated a fraud against the bankrupt. It would no longer be necessary to justify summary jurisdiction by proof that specific assets were in the actual or constructive possession of the bankrupt. Rather, a summary determination of fraud would subject all of an individual's assets to the bankruptcy court's summary jurisdiction. This abrogation of an individual's right to a plenary proceeding we cannot accept.

As stated in appellants' brief (pp. 18-19):

> "The fact that the relationship between an individual and the corporation is such that he may be liable for the obligations of the corporation does not mean that the individual's assets are those of the corporation, or that he 'is' the Corporation and is a bankrupt along with the corporation."

We find, therefore, that this was not a proper occasion for the use of summary jurisdiction. In the absence of property of the debtor in the actual or constructive possession of the court, no basis for summary jurisdiction is provided. A tortious conversion of funds, as alleged here, can only be established in a plenary suit. A summary proceeding cannot establish the fact of the conversion and in that manner justify the treatment of the converter's assets as part of the bankrupt's estate, and, in turn, justify the court's administration of the converter's assets. To sustain such an approach would result in a sacrifice of one's right to a full-dress trial to refute allegations of tortious behavior.

The order of the referee, affirmed by the district court, is reversed. Appellants' assets are not to be treated as part of the bankrupt estate until a plenary suit determines the issue. Nothing in this decision is intended to prejudice any future efforts by the trustee to seek a redress of grievances against appellants for their alleged tortious conduct, nor to indicate any opinion that the assets sought to be reached by summary proceedings cannot, or should not, be reached in a proper plenary proceeding, either under an alter ego theory, or otherwise.

Judgment.

United States Court of Appeals, For the Ninth Circuit.

B. L. Suhl, Margaret Wierman, Currency Exchange, and American Security Currency, Ltd., Appellants, vs. A. J. Bumb, Receiver in the Matter of Security Currency Services Ltd., a California corporation bankrupt, Appellee. No. 19,737.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is reversed, with costs in favor of appellants and against appellee.

It is Further Ordered and Adjudged that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

Costs taxed in favor of appellants:

Docket fee, Ct. of Appeals:	$25.00
Reproduction of record:	22.32
	$47.32.

Filed and entered June 28, 1965